United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2028

UNITED STATES ex rel. HAROLD KONIGSBERG,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITIONER-APPELLANT'S BRIEF

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INDEX TO BRIEF

INDEX TO BRIEF

TABLE OF AUTHORITES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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BRIEF FOR PETITIONER-APPELLANT

INTRODUCTION

This is an appeal from a final judgment of the United States District Court for the Southern District of New York (Honorable Harold R. Tyler, Jr. ex U.S.D.J.) dated January 13, 1975 denying the petition for habeas corpus relief sought pursuant to 28 U.S.C. 2254.

On January 22, 1975 the District Court granted an application for a certificate of probable cause. A notice of appeal was timely filed. Permission was granted by this Court to proceed on a limited number of copies of the brief and an abbreviated appendix.

Petitioner-appellant, HAROLD KONIGSBERG, is presently in New York State custody serving a sentence imposed on April 10, 1967, by the Supreme Court, New York County (Gellinoff, J.) following his conviction on February 7 and 8, 1967, after a jury trial, of

conspiracy to commit extortion, and four counts of extortion. Petitioner, a multiple offender, was sentenced to a term of ten to fourteen years on the conspiracy count and a term of twenty to thirty years on each of the extortion counts.

The sentences on the extortion counts were to be concurrent, the sentence on the conspiracy count was to run consecutively to the extortion counts and the entire State sentence of forty-four years was to commence only at the expiration of a ten year sentence earlier imposed by the United States District Court for the District of New Jersey (Shaw, J.) which petitioner had been serving since October, 1963.

The First Department of the Appellate Division of New York affirmed the conviction without opinion. *People v. Konigsberg*, 34 A.D.2d 616 (July 6, 1970). Leave to appeal to the New York Court of Appeals was granted by Chief Judge Fuld on July 6, 1970.

Thereafter, petitioner made motions to proceed as an indigent seeking to continue as he had done in the Appellate Division on the original record and waive the cost of filing an appendix to his brief. The motions were denied and the appeal was dismissed for failure to prosecute on February 1, 1971. Petitioner applied for certiorari and was denied on October 12, 1971 (414 U.S. 836). Subsequently, petitioner attempted to reinstate his appeal with the New York Court of Appeals. This attempt was denied on January 12, 1972. Petitioner no longer had state remedies open to him when he sought relief in the District Court.

Relief was first sought in the District Court in January, 1973 by the filing of a petition for habeas corpus with an accom-

panying notice of motion. In March, 1973 the District Judge referred the petition to Magistrate Schrieber "for review and report." Magistrate Schrieber correctly listed the petitioner's contentions as follows:

> "(1) That the findings of the State sanity hearings were clearly erroneous and he was denied fundamental due process by being required to go to trial although actually incompetent.
>
> "(2) That he was subject to a constitutional deprivation when he was permitted to improvidently waive his fundamental right to counsel.
>
> "(3) That he did not make an intelligent and knowing waiver of his right to trial by a jury of twelve.
>
> "(4) That his basic right to appeal was wrongfully frustrated.
>
> "(5) That he was denied a fair trial due to excessive prejudicial publicity.
>
> "(6) That he was denied a fair trial because an openly prejudiced juror was permitted to sit for a long portion of the trial.
>
> "(7) That he was denied an impartial trial due to prejudice on the part of the trial judge.
>
> "(8) That while defending pro se he was not apprised of the opportunity to get a hearing on information derived from the Court order on eavesdropping."

Additionally, by separate motion for leave to amend the petition pursuant to FRCP 15(a) filed on September 26, 1973, petitioner alleged that the assistant district attorney suppressed material and probative evidence relating to a promise made to Albert Hayutin, a key government witness. This, then became contention (9). It was not referred to the Magistrate.

On October 4, 1973 the Magistrate submitted a Memorandum recommending denial of the petition without a hearing in so far as the eight contentions referred to him were concerned. On October 16, 1973, while the original petition was still *sub judice* before him Judge Tyler granted the application to add contention (9), but denied relief on the merits.

On October 30, 1973 the Court below issued a Memorandum in which it stated that it had considered "the report and the papers and briefs of the parties" (no mention was made that it had read the state trial transcript) and that the Magistrate's report had "been approved with one exception..." That exception related to contention (2) above - that petitioner was subject to a constitutional deprivation when he was permitted to improvidently waive his fundamental right to counsel. An evidentiary hearing solely on that question - petitioner's competency to waive counsel - was held on April 1 and 2, 1974.

On January 13, 1975 the court issued an opinion finally disposing of and denying all aspects of the petition for habeas corpus relief.

It is submitted that review of the record in this case will reveal findings of fact which are clearly erroneous and

conclusions which are not supported by a reasonable interpretation of the underlying facts. Further, the claim is that the Court incorrectly denied an evidentiary hearing on the other contentions which taken as a whole demonstrate fundamental unfairness in the state trial violative of Fourteenth Amendment due process.

Contentions numbered by Magistrate Schrieber as (1) and (8) are not separately treated herein.

As to petitioner's sanity, the state court held a hearing and though we feel the decision was wrong, the hearing was constitutionally adequate.

As to contention (8) it is fully spelled out at pages 25-26 of the petition. It should be considered by this Court as another instance where the state unfairly imposed the doctrine of "waiver" from inaction by this mentally disturbed pro se petitioner. The People successfully argued in the state court that petitioner "chose not to contest the validity of the court order upon which (the) surveillance (electronic eavesdropping) was based." And it was argued that petitioner could not be heard to complain now.

The Magistrate did not hold any evidentiary hearing (*Wingo v. Wedding*, 418 U.S. 461 [1974]) but it is suggested that the practice followed in the case at bar nonetheless was violative of the Federal Magistrates Act. See *Ellis v. Buchkoe*, 491 F.2d 716 (6th Cir. 1974).

Further, the petitioner claims that the evidentiary hearing which was held by the District Judge was not a "meaningful" one, concerned as it was with the issue of competence to waive counsel more than seven years before. See *Drope v. Missouri*, __ U.S. __, 95 S.Ct. 896 (Decided February 19, 1975).

THE FACTS

(A) As They Relate to Waiver of Counsel

The indictment against petitioner filed in Supreme Court, New York County, on December 10, 1963 (No. 4725/63) contained ten counts alleging the following crimes with these possible penalties:

Count	Crime	Penalty 1st Offender	Penalty Multiple Offender
1	Conspiracy-Penal Law Sect. 580	0 - 7-1/2 years	3-3/4 - 15 years
2	Attempted Extortion - P.L. Sects. 851, 261	0 - 7-1/2 years	3-3/4 - 15 years
3	Extortion - P.L. §851	0 - 15 years	7-1/2 - 30 years
4	Extortion	0 - 15 years	7-1/2 - 30 years
5	Extortion	0 - 15 years	7-1/2 - 30 years
6	Extortion	0 - 15 years	7-1/2 - 30 years
7	Extortion	0 - 15 years	7-1/2 - 30 years
8	Extortion	0 - 15 years	7-1/2 - 30 years
9	Assault-2nd Degree, P.L.	0 - 5 years	2-1/2 - 10 years
10	Assault-2nd Degree	0 - 5 years	2-1/2 - 10 years

Petitioner had been arrested on October 23, 1963 prior to the indictment on a felony complaint. Thereafter before state indictment on October 25, 1963, the Hon. Robert Shaw, United States District Judge, District of New Jersey, revoked his bail which had been granted pending appeal of his July, 1963 federal conviction

and remanded him to federal custody to commence service of the ten year sentence which had earlier been imposed on July 16, 1963, following his conviction of possession of stolen goods from an interstate shipment.

The New York jury in February, 1967 found petitioner guilty of counts one, five, six, seven and eight, hung on counts two, three, nine and ten, and acquitted him on count four.

Petitioner was sentenced by the New York Court on April 10, 1967 as a multiple offender by reason of his conviction on the 13th day of October, 1950, in the County Court of Hudson County, New Jersey, of robbery and his conviction on the 16th day of July, 1963, in the United States District Court for the District of New Jersey.

On November 19, 1964, while in federal custody, petitioner was committed by order of the Supreme Court, New York County (Schweitzer, J.) pursuant to the provisions of the Code of Criminal Procedure, Section 658 for examination and report as to his competency to stand trial.

The examining doctors were not asked to and did not, in fact, separately focus on the question of petitioner's capacity to waive counsel in an intelligent fashion. The psychiatrists duly appointed by the Court reported that petitioner was competent to stand trial.

On January 18, 1965, petitioner moved pursuant to the provisions of the Code of Criminal Procedure, Section 662-a to controvert the report. An evidentiary hearing was commenced and thereafter concluded on April 27, 1965. At the conclusion of the

hearing, Mr. Justice Abraham Gellinoff, Justice of the Supreme Court, found petitioner competent to stand trial and confirmed the psychiatrists' report.

The findings by the Court on April 27, 1965, that petitioner was competent to stand trial also did not resolve the issue of his capacity or competency on January 3, 1967, to waive trial counsel and conduct his own defense. The record of the first Sanity Hearing in 1964 taken as a whole did not resolve the issue of whether petitioner was capable of waiving counsel in an intelligent fashion, or whether his waiver years later on January 3, 1967, was in fact competently or understandingly made. (See Judge Tyler's October 30, 1973 Memorandum, pp. 3-4.)

On September 4, 1965, while a federal prisoner serving the sentence imposed by Judge Shaw, petitioner was admitted to the Medical Center for Federal Prisoners, Springfield, Missouri. (For references, see Petitioner's Exhibits 2-7 of the Federal Hearing Transcript, "FHT," which contain the medical reports*.)

An extensive psychiatric examination was conducted by Dr. Howard D. Wilinsky, Staff Psychiatrist, whose report dated 11/9/65, stated the diagnosis of:

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*"FHT" refers to pages of the hearing before Judge Tyler. Unless preceded by such letters or otherwise noted, references are to pages of the state trial transcript which are before this Court. Sanity Hearing references will be specifically noted.

> "Schizophrenic reaction, paranoid type, characterized by autistic and unrealistic thinking with a mental content composed primary of delusions of persecution, ideas of reference, and ideas of grandeur. Visual and auditory hallucinations were also noted. The patient has poor impulse control, concrete and illogical thought, low flustration tolerance, labile, predominate angry affect bordering of rage, some episodes of depression were noted, guardedness, evasiveness, and hypermnesia."

It was recommended that petitioner be housed in the acute psychiatric unit and maintained in a structured environment on psychotropic medication.

On November 16, 1965, the Medical Center Psychiatric Staff met as a formal board of examinors for special review of petitioner's progress and for an interview period. Portions of its report read:

> "The patient had been housed on the acute psychiatric treatment unit and had been receiving approximately 1,000 mgs. of Thorazine, a psychotropic medication, daily. His behavior had been impulsive, unpredictable, passive, depressed and mute. He frequently excluded various portions of food, observing that he was being poisoned. At all times the patient's thought content was grandiose and paranoid."

At the conclusion of the report it was stated:

> "It is the consensus of the Psychiatric Staff that the patient is severely mentally ill. The Staff concurs with the diagnosis of the original psychiatric examination and further concurs that the patient should be certified under Section 4241."

Petitioner was seen again on January 10, 1966, for a formal staff report. It was agreed that the petitioner remained a severely ill paranoid schizophrenic. It was recommended that he

remain in the acute psychiatric treatment unit. It was further recommended that he be "Certified Psychotic."

On January 14, 1966, a psychological examination was conducted by Dr. Robert J. Murney, Clinical Psychologist. Numerous psychological tests were administered. The findings were that the petitioner had an average I.Q., that no evidence of malingering could be detected and that:

> "The present psychiatric evaluation provides evidence that Mr. Konigsberg is an emotionally disturbed person, who shows both neurotic and characterological problems as well as an underlying schizophrenic process. The neurotic problems center around strong conversion tendencies and what manifested most clearly in the MMPI. The characterological problems relate to deep and basic distrust of other people, particularly those in authority and emergent paranoid feelings and defenses centering around deeper dynamic problems involving unsatisfactory identification."

On April 5, 1966, petitioner was duly certified as being of "unsound mind" pursuant to 18 U.S.C. 4241 (Petitioner's Exhibit 4 FHT).

Petitioner was seen on April 19, 1966, by the Psychiatric Staff including Drs. Ciccone, Dubbin, Hildreth, Wilinsky, at which time he was interviewed, and his case again reviewed. It was the view of the psychiatric staff that:

> "The patient remained mentally ill and should continue his current treatment program. It was felt that a move to New York State would be detrimental to his recovery at this time. If such a move was to take place, it was recommended that the patient should be housed at a psychiatric treatment center and not at a federal detention center."

The diagnosis impression: schizophrenic reaction, chronic paranoid type in remission.

Petitioner was seen on special consultation by the psychiatric staff on May 27, 1966. He was presented to Dr. Settle, special psychiatric consultant from the Menninger Foundation, for reevaluation of his mental status and current treatment program. The report, in part, stated:

> "It is the consensus of the psychiatric staff that the patient remains mentally ill."

The report was signed by Dr. Howard C. Wilinsky, M.D., Staff Psychiatrist and present were doctors: Settle, Alderete, Hildreth, Moreau, Dubbin and Moore.

As late as August 8, 1966, Dr. Joseph F. Alderete, Chief of the Psychiatric Service reported to the Deputy Director of the Bureau of Prisons:

> "Konigsberg continues to remain essentially as seen on the staffing of May 27, 1966. That is, he has achieved a fair degree of stable adjustment. He is living on an open population ward. He is not on psychotropic medication. He works in the kitchen, and has been achieving fair work reports. He continues to be hostile, surly, negativistic. He still has symptomology suggestive of a paranoid schizophrenic reaction, although it is in partial remission. On the basis of current examination, this patient continues to remain incompetent to stand trial. However, this is really a legal question for the courts to decide. At any rate, it is our opinion that the patient continues to remain incompetent, and we would pass on this information on to the court to assist them in arriving at a final decision in this regard. While Konigsberg continues to remain incompetent to stand trial, I am of the opinion that he has made as stable an adjustment at this time, as he is ever going to make, and that he certainly is in sufficient remission from both a mental and physical point of view to be available for transportation and trial in New York County, should this be requested at this time. To

summarize the issues: (1) he continues to remain incompetent to stand trial. (2) He has made as stable an adjustment as he is likely to make, and further improvement is not foreseen in the immediate future, therefore, he is as able at this time as he will be in the future to be physically transported to New York to stand trial. (3) There are no medical or psychiatric conditions or contra-indications to transporting Konigsberg to New York to stand trial at the present time. (4) Konigsberg is available at this time for transportation to New York, however, it is well to be advised that this patient while presently exhibiting stable adjustment, a potentiality for disintegration is well established. In other words, if there is any long delay in transporting him, his mental status could well deteriorate, and in that event, there may be psychiatric contra-indications to transporting Konigsberg. (5) In the event Konigsberg is transported to New York to stand trial, it is the recommendation that he be housed in a psychiatric facility, such as Bellevue, while awaiting trial."

(Petitioner's Exhibit 6 FHT.)

(See Petitioner's Exhibits 2-7, FHT.)

On November 8, 1966, Dr. Wilinsky traveled to New York and examined petitioner at Riker's Island (petitioner not having been housed in a psychiatric facility) and concluded he was severely mentally ill. (FHT, 16, 27-29.)

As a result of all this, petitioner's then attorney, Frances Kahn on November 1, 1966 moved to have petitioner committed to Kings County Hospital for a second sanity examination into his competence to stand trial and this was granted. Petitioner was examined by Drs. Walter Bromberg and Anthony Jimenez, both of whom were appointed by Mr. Justice Gellinoff pursuant to law.

Neither Dr. Bromberg nor Dr. Jimenez were asked to and did not in fact focus separately on the question of petitioner's

capacity or competence to later waive counsel in an intelligent fashion. The nature of their examinations (each lasting for about an hour) appear at pages 1782-1802 and 1772-1780 of the minutes of the Second Sanity Hearing.

Doctor Jimenez, prior to his examination, recalled having been told by Dr. Bromberg that the trial Court wanted a "quick report" (Second Sanity Hearing Minutes, 2256) and no psychological studies were made.

Both doctors diagnosed petitioner as "(1) Sociopathic Personality with Emotional Instability, (2) Conversion Hysteria, (3) There is a suggestion of Ganser-like Syndrome in his reaction." They concluded that petitioner was competent to stand trial within the criteria set forth in the Code of Criminal Procedure, Section 658.

On November 9, 1966, petitioner's counsel moved to controvert the report pursuant to the provisions of the Code of Criminal Procedure, Section 662-a. A Second Sanity Hearing was commenced and thereafter concluded on December 2, 1966.

Petitioner did not testify at the competency hearing.

Dr. Bromberg informed the state trial judge that petitioner gave him no answers on the legal side and further testified that he himself had little knowledge of legal matters. (Second Sanity Hearing Minutes, 1477.)

There was unrebutted testimony received at the Second Sanity Hearing to the effect that a majority of the examining doctors at the Medical Center for Federal Prisoners were of the opinion that petitioner did not in some "realistic measure know

the kind of trouble he could get into were he to be found guilty" (Second Sanity Hearing Minutes, 1543, see 1547, 1610).

The trial court found that petitioner did not function as a "normal" person and stated many times that *petitioner was mentally ill, and insane*, though not legally incompetent to stand trial under the Statutory standards (see Second Sanity Hearing Minutes, 1344, 1365, 1399, 1527, 1528, 1548, 1593, 1923).

At the conclusion of the hearing, Mr. Justice Gellinoff found petitioner competent to stand trial applying the criteria set forth in the Code of Criminal Procedure, Section 658.

The findings dictated by the trial court did not resolve the issue of petitioner's capacity or competency to waive trial counsel and conduct his own defense which did not arise until later on in the proceedings. (Second Sanity Hearing Minutes, 2399-2416.) The record of the Second Sanity Hearing taken as a whole did not resolve the issue of whether petitioner was capable of waiving counsel in an intelligent fashion, or whether his waiver of January 3, 1967, was in fact competently or understandingly made.

There was nothing in the record of the two Sanity Hearings taken as a whole which supports the conclusion that petitioner knew the "worst of the consequences" were he to be found guilty. There was on the other hand, the unrebutted consensus of the doctors at the Medical Center for Federal Prisoners to the effect that petitioner did not understand the range of allowable penalties were he to be found guilty.

Judge Tyler in his Memorandum dated October 30, 1973 noted:

"The state record does not clearly reveal that the trial judge made an express, detailed ruling on the question of intelligent waiver. His remarks on the issue, set forth at pages 7-8 of the Magistrate's report, can be read, of course, to express his ultimate conclusion, but these are at least arguably insufficient to indicate whether or not he relied upon the testimony of the doctors in the previous sanity hearings in reaching that conclusion. Assuming that the trial judge may have done so, the lengthy transcripts of the sanity hearings do not clearly indicate that the doctors were asked to focus separately on the question or possible question of Konigsberg's capacity to waive counsel in an intelligent fashion."

The state trial commenced in December 1966. On January 3, 1967, only after four days of taking testimony, during which just two witnesses had testified, petitioner for the first time addressed the Court. (593) The trial record reflects:

"THE DEFENDANT: I'll straighten the records out. Before any jury comes in certain motions have to be made in behalf of the defendant.

"THE COURT: All right. All right, hold the jury.

"THE DEFENDANT: The defendant, Harold Konigsberg, as of now, has representation of -- Harold Konigsberg will be represented by counsel, himself and Judge Roy Bean will from hereafter take care of all matters, talk to all witnesses, examine all witnesses. Do we understand this as of now?

"THE COURT: Yes, that is perfectly okay. You can represent yourself and have any evidence presented on your behalf that you wish. Miss Kahn is directed by the Court to continue to sit at counsel table and to be of such assistance to you as you wish to avail yourself of.

"THE DEFENDANT: Well, we don't need no assistance from any spies, plotters, from you

> or the District Attorney here. All we're interested in is a trial, to defend the defendant, Harold Konigsberg, Judge Roy Bean and myself, and we have a motion, the first motion that is important to the defendant. He'd like to have his wife, Katy, sit over here to take notes, because he has the trouble of spelling, and he don't write too good, but he can read very good, so it's very important to his defense that she assist him here as far as taking notes when necessary, when he is cross-examining or on direct examination." (593-594)

The record is barren of any investigation by the trial judge or any colloquy with petitioner into the circumstances of petitioner's dissatisfaction with Frances Kahn (who was herself awaiting commencement of her own jail term for obstruction of justice imposed by the Hon. Edward C. McLean, U.S.D.J., Southern District of New York -- see Second Sanity Hearing, 1582) or of petitioner's apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, the possible added liability as a multiple offender though the felonies were out of state, the possible defenses to the charges and circumstances in mitigation thereof or the possible alternative of securing other counsel. And, the Court had no off-the-record discussions with petitioner relating to these matters prior to its acceptance of petitioner's purported waiver. (FHT, 106-07, 122, 123.)

The record, for example, reflects that petitioner did not fully comprehend the elements of the crimes charged and the defenses available (see 1356, 1620-21, 1700, 1690-1720, 1729, 3294-96, 3450), that petitioner advised the Court that he did not know when the Grand Jury minutes were admissible (663); that he didn't know what an exception meant (607); that he asked the Court what the rules

were (604); that often he was unable to properly frame questions; that petitioner asked the Court to explain the difference between relevant and irrelevant matters (1616); that petitioner asked that everything come into evidence including hearsay (1646); that petitioner advised the Court he wanted to destroy himself by his questions (2700); *and more importantly that petitioner abandoned the insanity defense earlier interposed by his then counsel who had opened to the jury urging this as the defense.*

On the next day, January 4, 1967, when the assistant district attorney asked the Court if petitioner fully appreciated the danger of waiving counsel, the Court answered:

> "I don't know, Mr. Rogers. The record speaks for itself. The record speaks for itself." (733)

The Court went on to say:

> "His words speak for themselves. I have never yet seen a man who is as clear and as cogent and as convincing and as persuasive as this defendant and that includes many lawyers."

Despite the Court's opinion of petitioner's abilities (as purportedly evidenced by his conduct between pages 593 and 733) such an opinion is not fairly supported by the entire record as it existed then or as the trial progressed. (See 1729 and the page references above.) *See in particular pages 3294-96 where the Trial Court pointed out the terrible disadvantage to petitioner from his having tried the case himself.*

Though petitioner was aware he had two prior out-of-state felony convictions he was, however, (and this stands unrebutted) unaware at the time he waived counsel on January 3, 1967 and chose to conduct his own defense, that he would be liable as a multiple offender under New York Law based on two out-of-state convictions

(see FHT 66, ff.) thereby substantially increasing the range of allowable punishment.

On the afternoon of January 5, 1967, in response to calls from Frances Kahn, Frank Lopez, an attorney, entered the case to assist petitioner (955). He took his directions from petitioner (FHT, 66 ff.), and his role was limited (1039, 1046, 2247-48, 2475-76, 2599, 2639-40, 2834, 2952-53).

Petitioner conducted his own defense. See in particular the testimony to this effect by Justice Gellinoff, FHT 154 and pages 1700, 3078, 3296, 3799 of the trial record, as well as p. 182 of the sentence minutes. The record also shows that on a number of occasions neither Mr. Lopez nor Miss Kahn even attended Court sessions. See trial record, 1820, 2202, 2316, 2473, 2605, 2791, 3057, 3166, 3251, 3301.)

It was not until after the session of January 5, 1967, before the cross-examination of Albert Hayutin, that petitioner was first made aware of his liability as a possible multiple offender, as well as the range of allowable punishment. This occurred in a discussion with Frank Lopez as to the possible methods, i.e. threats of severe jail time, which Mr. Lopez suggested the prosecution might well have used in order to get a co-defendant, Hayutin, to cooperate (FHT 70).

However, at the time of these discussions between Mr. Lopez and petitioner, the Court had earlier made known to Mr. Lopez at the conclusion of the January 5, 1967 session, that even were petitioner convicted, the Court "would not throw the book" at him. Mr. Lopez communicated this to petitioner (FHT 72).

And, in open court the Trial Judge as earlier noted complimented petitioner's purported clarity of mind and abilities (FHT 72).

The Court on several occasions on the record falsely reassured petitioner that were he convicted it would "not throw the book" at him and further complimented his abilities (see Trial References at 1699, 1717, 1721, 3296--will not throw book at petitioner; see 733, 1699-1700, 1717--as to his abilities).

The combined effect of unduly complimenting petitioner's abilities and assuring him that if he were convicted the Court would not "throw the book" at him served only to impair petitioner's capacity to make a rational judgment as to whether he should turn over the conduct of his case to counsel or take any advice from anyone. It served as well to allay his fears as to the "worst of the consequences" were he to be found guilty. (FHT 29ff, 68-69, 73.)

Judge Tyler made these findings: (opinion of January 13, 1975)

1. Two lawyers "remained available by court direction at petitioner's table" (p. 8).

2. There was "continued presence" of these lawyers in Court (pp. 8, 18).

3. Mr. Justice Gellinoff made sufficient inquiry into the issue of petitioner's competency to waive counsel (p. 11).

4. There was sufficient evidence from the competency hearings upon which to conclude petitioner was so competent (p. 11).

5. Although it is important that a defendant desiring to waive counsel and act as his own attorney appreciate the

importance of the proceedings in which he is involved and their possibly severe consequences, it is not necessary that he know the worst of the consequences were he to be found guilty, which is required for example in the waiver of a trial and the taking of a plea (pp. 14-15).

It is submitted that in Point I of this brief commencing at page 39 it will be shown that the findings of fact are clearly erroneous and the conclusions are not supported by a reasonable interpretation of the underlying facts.

The evidentiary hearing before Judge Tyler took place more than seven years after the alleged waiver. It could not be and was not a "meaningful hearing ... at this late date." See *Dusky v. U.S.*, 362 U.S. 402 (1960) and particularly: *Drope v. Missouri*, __ U.S. __ (1975), 95 S.Ct. 896 at 909 (Decided February 19, 1975).

The remaining factual discussion relates to other aspects of the trial which taken as a whole demonstrate the deprivation of fundamental fairness implicit in due process. An evidentiary hearing was denied as to all these points, Judge Tyler having "approved" of the report of the Magistrate (Memorandum of Judge Tyler dated October 30, 1973) after considering only the "Report and the papers and briefs of the parties" - no reference being made to a reading or consideration of the trial minutes. It is submitted this procedure was error. *Ellis v. Buchkoe*, 491 F.2d 716 (6th Cir. 1974).

(B) As They Relate to Prejudicial Publicity

With petitioner conducting his own defense, the proceedings took on a carnival atmosphere. The February 2, 1967 New York Times referred to it as "the poor man's circus." The Court added to this atmosphere when it informed the jury:

> "All right. The record will show that Mr. Harold Konigsberg, the defendant, has stated in open court that *he wishes to be his own lawyer, he and Roy Bean*, and he has requested that his wife be permitted to sit alongside of him to aid him by taking notes, and the Court has granted that request, and the Court has directed Miss Kahn to sit alongside and to have a whatever assistance she can." (597)
>
> (Emphasis added)

The case strongly attracted the attention and interest of the press and public. The papers covered the proceedings in depth. The newspaper reports of the trial were factually misleading, uniformly prejudicial to petitioner and recounted interviews during trial with the prosecutor.

For example, on December 21, 1966, after jury selection but before the taking of testimony, the New York Daily News carried the following damaging article concerning the proceedings against petitioner:

> "SHARK'S PALS COP PLEAS IN EXTORTION TRIAL"
>
> "In a dramatic switch, three co-defendants of Harold (Kayo) Konigsberg, a notorious, 230-pound loan shark and muscleman, yesterday pleaded guilty in Manhattan Supreme Court and left Konigsberg to go it alone in a fight of charges of extortion, conspiracy and the brutal, lead-pipe beating of a now-dead Wall Street broker.
>
> "The trial opens today.

"Justice Abraham J. Gellinoff was ready to begin hearing testimony after Assistant District Attorney Frank Rogers and Abraham Brodsky of Brooklyn, the defense attorney, had spent a week and a half picking a jury, when Konigsberg's fellow defendants entered their guilty pleas.

"They are Albert Hayutin, 54, a Denver businessman specializing in real estate, Nicholas Angelo, 55, of Brooklyn and Florida, and Anthony Stracci, 56, of 253 W. 72nd St., brother of Mafia don Joe Stracci.

"The three indicated they will testify for the state as Konigsberg struggles in court to free himself from 10 counts of an indictment arising out of a brutal beating administered to Joseph Cannistraci, 32, on Oct. 2, 1963.

"At that time, Cannistraci owned and headed Christopher & Co., a brokerage firm with offices at 99 Wall Street.

"On Sept. 20, he was found dead on the Long Island Expressway near Lake Success, slain by three bullets administered during a gangland ride.

"As the object of the alleged 1963 going-over by Konigsberg, a ham-fisted giant who is known in the underworld as Tony Arrico and has a police record going back 18 years, Cannistraci was to have been the state's star witness in this trial.

"After the surprise pleas, Gellinoff released Stracci in $7,500 bail and Hayutin in $2,500 but held Angelo, a fourth offender. Sentencing was set for Feb. 8.

"Konigsberg, whose record includes a 10-year federal term for possession of stolen goods, is being held without bail.

"According to the indictment, by October, 1963, Cannistraci and an unidentified partner had fallen behind in a pledge to give Hayutin $50,000 in a whirlwind deal involving the floatation of stock in an enterprise to be known as National Growth."

Following this article in the Daily News, prior to the start of petitioner's trial, and during the trial, motions were made for a "voir dire" (108, 109) of the jurors to determine whether any individual juror had read the articles. (See e.g. 113, 869-870, 1141-43, 1144, 1146-47, 3124, 3125, 3143, 3144, 3147, 3784, 4023, 4024 where such motions were made and where the Court was alerted to what was being printed.)

Despite repeated requests to do so, not once during the course of petitioner's entire trial did Justice Gellinoff poll the individual jurors to determine if any of them had read and been adversely influenced by the newspaper publicity against petitioner, or consider sequestration or calling upon the press and prosecution to exercise restraint. (Copies of the more than twenty newspaper articles concerning petitioner's trial which appeared in New York City daily newpapers during the course of petitioner's trial were submitted to Judge Tyler, enclosed in a letter to him dated March 16, 1973.) In addition a juror had taken into the jury room and listened to a radio during deliberations (4242, 4248-50).

Though this case was tried well after *Sheppard v. Maxwell*, 384 U.S. 333 (1966), Mr. Justice Gellinoff erroneously felt he was entirely without power to shield petitioner from newspaper publicity. He ruled:

> "All right. The Court rules that the press has a perfect right to report what is going on in court. *The Court rules that the press has a perfect right to print whatever information it obtains from whatever its source may be. The Court rules that the press indeed is under an obligation and a duty to report matters which they in their sole and uncontrolled discretion consider to be of interest to the public, subject to the rules and to the laws of libel.*" (109, 110)
>
> (Emphasis added)

The Court ruled that all that was needed to protect petitioner was to admonish the jurors as a body not to read the papers.

The trial of this case was long, tedious and complex. This was not a simple extortion case. The evidence was voluminous, the witnesses many and the documentary proof of accounting books and records detailed.

(C) As They Relate to the Prejudiced Juror

Shortly after the taking of testimony began, this mentally disturbed petitioner defending himself, was confronted with the following problem: (R 719-724)

> "JUROR NO. 10: Your Honor, may I make a point of inquiry as to whether the reintroduction or the introduction rather of certain elements of this case does not go beyond what we originally agreed to. Now we have a different set of problems to contend with from which we agreed to originally.
>
> "THE DEFENDANT: Oh, what did we agree to? I haven't heard no agreement. What is this agreement?
>
> "JUROR NO. 10: Your Honor, I'm speaking to you, if you don't mind, in open court.
>
> "THE COURT: Yes.
>
> "JUROR NO. 10: Because there are certain elements of this case that do not--did not exist when we agreed to serve as your jurors on this case. Now we have a different set of problems that more

or less in my opinion vitiates that which we started with at the beginning, sir. Now we have a different set of problems to contend with that we did not have. And when we are asked certain questions in the beginning, at the start of this case, sir, we agreed to certain things. Now we come to a different set of circumstances to which, if I had known to be in the case at the beginning of the case, *I would have said I would have been a prejudiced juror and would not have sat.*

"THE DEFENDANT: Oh, let's find out what he means. I want you to ask him.

"JUROR NO. 10: I'm speaking to the Court.

"MR. ROGERS: Can we get some decorum here?

"THE DEFENDANT: I'm talking to the Judge. Would you find out what he means he's prejudiced now?

"THE COURT: Yes, you are entitled to know.

"THE DEFENDANT: Oh, your Honor, you're right, I'm entitled. I want to know what he's--

"THE COURT: What do you mean, you are prejudiced now?

"JUROR NO. 10: *I am prejudiced at the present time, yes, sir; I cannot sit as an unprejudiced juror in this case, sir. I cannot in all good conscience as an unprejudiced juror sit in this case at the present time.* At the inception of this case I answered certain questions, of Mr. Rogers and the lady attorney, and under those circumstances I could most properly sit as an unbiased juror. At the present time there are certain elements entering the case that I simply cannot follow as a juror, and I am very sorry.

"THE COURT: Well, you will report tomorrow at 2 o'clock.

"THE DEFENDANT: Oh, no, your Honor.

"THE COURT: And I will think about--

"THE DEFENDANT: No, no, Judge, this is no good. We got to set this now, because there is more important--there is a more important question here. You have told these jurors time and time again not to discuss this case among themselves. One. He he's prejudiced. I don't even know if that doesn't mean--I know if I was a juror, Judge, it don't mean nothing. I'd talk to the jurors. And you know what happens. So I know I got to be afraid.

"THE COURT: Now--

"THE DEFENDANT: Wait a minute, let me--hear me out. I got to be afraid that God forbid, that means he's prejudiced against me. If he's now prejudiced against the District Attorney I'm lucky; if he's prejudiced against me I'm unlucky.

"JUROR NO. 3: Can we have this out without us?

"THE COURT: Wait a minute, wait a minute.

"THE DEFENDANT: Well, there's another fellow who is prejudiced.

"THE COURT: No, no. Now, please Mr. Konigsberg.

"THE DEFENDANT: Now, I want that on the record that--that the juror--what--oh, what is your number? What is the number there, can anybody tell me?

"JUROR NO. 3: Three.

"THE DEFENDANT: 3 jumped up and says, 'Can we have this out without us'. Now, that means only one thing, only one thing, Judge. You can't let this jury--you can't let this man and this other man sit in this box.

"THE COURT: Mr. Konigsberg, Mr. Konigsberg, we will take a recess until tomorrow at 2 o'clock, at which time I will dispose of the problems created by this jury. All right, 2 o'clock."

(All emphasis supplied)

* * * * *

"(Whereupon the jury left the courtroom after which the following occurred in their absence:)

"THE COURT: Now, Mr. Rogers, what records do you--

"THE DEFENDANT: Before we go on the record I have a motion.

"THE COURT: Yes. Go ahead, Mr. Konigsberg.

"THE DEFENDANT: I move now that this jury is so contaminated with other jurors sitting there that don't want to sit, I move now that not they be excused, the whole jury be excused, a new jury come in and we start all over again; that this is a prejudiced jury, I cannot get a fair trial, and they have already made up their mind in favor of--of the District Attorney without even hearing all the evidence.

"THE COURT: All right. Motion denied."

The Court never addressed itself to the problems presented by Jurors 10 and 3 on January 3rd, until February 6th, 1967, when Juror No. 10, Mr. Steffe, was called into the courtroom in the absence of the other jurors shortly before commencement of deliberations and the Court asked the petitioner what he wished to do in relation to the juror (4014). The petitioner asked that the juror be excused with his consent inasmuch as he did not believe he could be a fair juror (4019). The juror was excused (4023).

No similar inquiry was made by the Court in relation to Juror No. 3 with respect to the import of his outburst, "Can we have this out without us?" Whether he meant that the Court and Juror No. 10 should settle problems in his absence or whether he was asking to be relieved of his duties as a juror was left undetermined. The Court acknowledged that petitioner had a right to know

but was ineffective in granting a proper and adequate hearing that would have assured protection of petitioner's right to "due process." At the time Juror No. 10 was discharged, the Court made no inquiry respecting Juror No. 3, and No. 3 was sent in to the jury room to deliberate with the rest of the panel, and, of course, his arguments were heard by the fact-finding body. The Court permitted an outspoken prejudiced juror to remain, without cause, as a juror throughout the trial risking in the course thereof the terrible danger of contamination. Petitioner recognized the danger of contamination by permitting the prejudiced juror to sit, but this was ignored by the Court. (735)

During the trial the Court itself observed:

> "every other juror practically wants to be excused..." (1134)

The Court invited the jurors to talk it out, that is their predicament amongst themselves. (See 1134-37.)

One simply cannot capsulize the atmosphere of this heavily reported fully attended trial. The newspaper reports give us a clue as does the frequent efforts of jurors to be excused.

(D) <u>As They Relate to the Suppressed "Assurance" to Key Witness</u>

A key state's witness who testified against petitioner was Albert Hayutin, who it was claimed had hired petitioner to collect monies owed to Hayutin by the alleged "victims" of petitioner's extortion. In his cross-examination which took place after Hayutin had pleaded guilty but was awaiting sentence he was asked:

"Q. Is that correct? Have any promises been made to you what your sentence would be, if any?

"A. No, there have not been.

"Q. Were you told that your testimony would be taken into consideration?

"A. No." (Tr. 568-569)

Again:

"Q. Did anybody tell you as to what you are going to get?

"A. No." (Tr. 1969)

After defendant was convicted and sentenced, Hayutin appeared for sentence. His attorney argued for a suspended sentence on the basis that the prosecutor had "assured" counsel that there would be a suspended sentence prior to Hayutin's plea and before his testimony against petitioner. Hayutin received a suspended sentence. It was this circumstance that prompted the motion before Judge Tyler dated September 25, 1973 and filed September 26, 1973 to amend the petition to add this "suppression" point. Annexed to the motion papers are Hayutin's sentence minutes where his attorney spells out the understanding with the prosecutor. On October 16, 1973 Judge Tyler permitted the addition to the petition but on the merits and without an evidentiary hearing denied relief.

(E) <u>As They Relate to Other Trial Occurrences</u>

A major claim of "waiver" came at another critical time, that is during jury deliberations at a time when petitioner needed to know his rights and what could result by withholding his "consent." While the Supreme Court has held that the Constitution does not

prohibit a jury of less than 12, it has expressed doubts about the constitutionality of a jury of more than 12. In any event, what is now at issue is whether consistent with insuring petitioner a fair trial he was sufficiently advised of nis rights on a critical issue in order to waive his right to a 12 man jury and in effect consent to a thirteenth juror well along in the jury's deliberations.

The Court submitted the case to the jurors after its charge on February 6, 1967, at 2:34 p.m. (4184). The alternate jurors were separated from the main body of jurors at this time (4184). The jurors returned to the courtroom at 11:15 p.m. when they advised the Court that they had not reached a verdict (4188). The Court then sent them overnight to a hotel (4188-4189).

Jury deliberations commenced again the following day, February 7, at 10:30 a.m. (4190). At 3:30 p.m. (4190) some twenty-five hours later, a "hopelessly deadlocked" jury assembled in open Court. The Jury Foreman submitted a message from Juror No. 3, as follows (4201-4202):

> "Your Honor, my health will not permit me to excite myself any further. Please send an alternate into the jury room in my place."

The Court inquired of Juror No. 3 in the presence of the entire jury in open Court and after he had recharged on the definition of conspiracy as follows (4201):

> "THE COURT: Now do you think you want me to comply with your request?
>
> "JUROR NO. 3: I would appreciate it.
>
> "THE COURT: You cannot. Well, Mr. Defendant, have you any objection to my excusing juror number 3?"

At this moment, the Court addressed petitioner in full view of the jurors who had been confined in their deliberations for twenty-five hours including an overnight at a hotel and two alternate jurors who naturally had not participated in any of the deliberations. Petitioner responded:

> "His health is more important at this point, your Honor." (4202)

The assistant district attorney apparently was forewarned of the juror's request since he presented the Court with a "most recent decision." The case was: *People v. Ryan, and Ravich*, 19 N.Y.2d 100, 278 N.Y.S.2d 199 (1966). The assistant district attorney asked to approach the bench. There an off-record discussion was had wherein petitioner asked for the decision handed to the Court by Mr. Rogers and for the exclusion of the jury from the courtroom. Both applications were denied (4202).

The Court then removed the juror and misinformed the pro se defendant as to the authority of the Court:

> "Under the statute and under the law as it has been interpreted, the Court has the power in its discretion to excuse you, and so, Mr. Kaufman, you are excused from further consideration of this matter, with the thanks of the Court." (4202)

The juror then left the jury box and exited from the courtroom and the Court directed the Clerk to call for an alternate juror (4203). Assistant District Attorney Rogers halted the procedure with an emphatic interjection (4203-4204):

> "No. Might I just, Mr. Kelley, point out to the Court page five of this decision, People v. Ravich, and I call the Court's attention to the third paragraph. Actually, it's the second of page five as I have it

mimeographed here. (Document handed to the Court.) What I'm pointing out, sir, is I believe a reading of that would indicate that there must be an instrument in writing: in other words, Mr. Konigsberg must sign. You see? (indicating to the Court)."

"THE COURT: Yes. All right. Then write out something to the effect that the defendant, Konigsberg, consents that Juror number 3 be excused....Write it out, Mr. District Attorney, in your handwriting."

The Court exercised no caution to determine whether petitioner understood that by refusing to permit a replacement after more than 20 hours deliberation he could have a mistrial. Quite the contrary, the Court moved fast to have the "consent" signed and resisted any attempt by petitioner to get needed advice.

At this point, the petitioner on signing the consent in the tense presence of the Court and in full view of the remaining eleven jurors and two alternates and before turning over the written consent attempted to make a statement as to his doubt in excusing Juror No. 3, when he was sharply cut off by the Court (4205):

"THE DEFENDANT: Your Honor, I was just thinking for a second--

"THE COURT: All right, don't make any statements. Please, Mr. Konigsberg, no statements."

All the jurors were still present except for Juror No. 3 who had been previously excused. The moment the jurors left the courtroom to deliberate with the substituted juror the following colloquy ensued (4206-4208):

"THE COURT: On behalf of the defendant the Court imposes an objection to the Court's

supplementary instructions to the jury, on the ground that they were erroneous; on the ground that they were inflammatory; on the ground that they were calculated to coerce a verdict by the jury; that they were highly prejudicial to the defendant; and the defendant now moves for the withdrawal of a juror and a declaration of a mistrial. All motions are denied. The defendant has an exception. No speeches.

"THE DEFENDANT: One motion, Your Honor.

"THE COURT: All right; make it.

"THE DEFENDANT: The defendant--and it's not a speech, and I didn't intend it to be a speech. The jury--the foreman of the jury communicated with this Court and said they were hopelessly deadlocked. Another juror said he was sick, and his health is an important as my freedom. I--

"THE COURT: You said you weren't going to make a speech. What is your motion?

"THE DEFENDANT: I'm not making speeches. That is the motion, if you will give me time, your Honor. How long are your going to harass me?

"THE COURT: What is your motion?

"THE DEFENDANT: Will you be patient with me?

"THE COURT: All right, that is enough.

"THE DEFENDANT: Judge--

"THE COURT: You make a motion.

"THE DEFENDANT: You refuse to--I am making the motion.

"THE COURT: All right, make it without speeches.

"THE DEFENDANT: I'm not making a speech, and this is my motion. This jury said they were hopelessly deadlocked. This Court refused to accept that. Another juror was sick. If they're hopelessly deadlocked,

> then if we should dismiss this jury, the withdrawal of a juror and call a mistrial--"

What is obvious is that petitioner wanted a mistrial and could have had one were he adequately advised of his rights vis-a-vis the "consent." Once again this was justified as another instance of petitioner's "waiver."

What petitioner got as the 13th juror was someone who did not partake in the first twenty-five hours of deliberation.

As earlier noted, the jury began its deliberations at 2:34 p.m. on February 6, (4184). By 10:25 p.m. there was no verdict and the jury was sent to a hotel for the night (4185). The following day at 3:30 pm., February 7, the jury communicated to the Court, "Your Honor: One. Jury hopelessly deadlocked on practically all counts (4181)." The jury also asked for additional instructions on the conspiracy count (4192).

The Court in response thereto proceeded to instruct the jury of a victim from whom money had been stolen and considering that civil litigation would be too prolonged thought of seeking its return "by hook or crook . . ." (4194). The Court continued with the following statement (4194):

> "Now, that's just in my mind: I haven't done anything wrong; I've just thought about it. Supposing I go a step further and I get ahold of you and we agree, 'Look, we'll get that money. *We have to kick the shit out of him*, but we're going to get it'."
>
> (Emphasis added)

During the course of trial, Hayutin on direct examination had testified how he had been victimized and finally in desparation went to the petitioner for assistance on the suggestion of a mutual

friend and the witness went on to summarize the petitioner's reaction to his plea (194):

> "*** and I explained the various moneys that were taken, and he said that he would be able to recover the money from these people. If necessary, he would throw a scare into them and if that wouldn't do it, *he could even kick the shit out of them*, but he would be able to recover the money."
>
> (Emphasis added)

The Court added (4195-4196):

> "Now, what is this overt act that we must do? We don't actually have to threaten him. We don't actually have to go over and beat him. If I say to you, 'Look, call him up and tell him to come to this meeting,' and the reason why I am telling you to call him up is to tell him to come to this meeting so that when he gets to this meeting we can do something about it, that, members of the jury, may be considered by you as an act besides the agreement to effect the object of the agreement."

Once again the instruction, supra, was identical to that testified to by Hayutin in his testimony in chief (200-201). Thereafter the Court itself made the following observation and remarked to the jurors (4199-4201):

> "Now, members of the jury, go back, reason with each other. Don't by any means get the impression that I am trying to coerce you. . . . Now, do you think I've answered that question. Members of the jury?
>
> "THE FOREMAN: Yes, very clearly.
>
> "THE COURT: All of you. I'd like an answer from all of you, because--
>
> "SEVERAL JURORS: Yes.
>
> "THE COURT: Because if there is one who thinks I haven't answered it, tell me and I will talk more. How about you, sir, have I answered it?

"JUROR NUMBER 2: Yes.

"THE COURT: You?

"JUROR NUMBER 3: Yes.

"THE COURT: You?

"SEVERAL JURORS: Yes.

"THE COURT: Have I answered it to the satisfaction of all of you?

"SEVERAL JURORS: Yes.

"THE COURT: Do you understand?

"SEVERAL JURORS: Yes."

The jury having retired to resume further deliberations at 3:52 p.m. (4206) returned at 6:30 o'clock p.m. with a finding of guilty on the conspiracy count (4209). From 2:34 p.m., February 6 until 3:30 p.m. February 7, when they announced their hopeless deadlock they were unable to agree but after the Court gave this further instruction on the conspiracy count, obviously zeroing in on the trial testimony, they agreed in approximately two hours and a half.

After the jury retired, the Court, on its own motion, made the following statement (4206):

> "On behalf of the defendant the Court imposes an objection to the Court's supplementary instructions to the jury, on the ground that they were erroneous; on the ground that they were inflammatory; on the ground that they were calculated to coerce a verdict by the jury; that they were highly prejudicial to the defendant; and the defendant now moves for the withdrawal of a juror and a declaration of a mistrial. All motions are denied. The defendant has an exception."

The Court's charge, can be regarded as nothing less than a direction to convict.

(F) As They Relate to the Frustration of the Right of Appeal

Chief Judge Fuld of the New York Court of Appeals on July 6, 1970 had certified that petitioner's case had issues worthy of appellate review. Nevertheless, petitioner's right of direct appeal was lost when his appeal was dismissed, prompted by the prosecutor's false hearsay assertions that petitioner could afford to reprint a costly appendix.

Petitioner already had one direct appeal of his state conviction, that being to the Appellate Division of the Supreme Court which on March 17, 1970, affirmed without opinion (34 App. Div. 616). That appeal was heard on the original record in light of petitioner's claim of indigency. Only in the Court of Appeals did the prosecutor dispute this and prevail in requiring petitioner to file an appendix.

The thrust of petitioner's application to the District Court was that his right of direct appeal to the Court of Appeals was improperly frustrated by the State by reason of his lack of funds and as a result thereof, he was denied his rights of due process and equal protection guaranteed to him by the Fourteenth Amendment to the United States Constitution.

Petitioner's difficulty was compounded during the period in which he sought relief from the New York Court of Appeals by the fact as already noted that since April 5, 1966, he was at the Federal Medical Center at Springfield, Missouri, having been initially certified as being of "unsound mind." And, though he had been decertified in August 1967, he nonetheless remained classified

as one requiring medical care and treatment. In this condition he was also without effective assistance of counsel, having moved to discharge his counsel. In turn, counsel had also sought permission from the Court of Appeals to withdraw. His counsel was denied permission to withdraw. However he performed no other service for petitioner and the motion papers were prepared in the Court of Appeals by petitioner (as it turns out on erroneous information which his then lawyer had provided as to the required contents of the appendix and the costs thereof).

When petitioner was unable to obtain a factual hearing on his claim that he was without sufficient funds to perfect the appeal, his ability to appeal was thus aborted and it was dismissed.

An attempt by new counsel to reinstate the appeal on the ground that petitioner had been misinformed as to the needed contents of the appendix and the costs thereof, was denied by the New York Court of Appeals on January 12, 1972. With the denial of certiorari, petitioner turned to the federal court for relief.

The petitioner-appellant claims herein that the record does not fairly support the determination made by Judge Tyler. That his findings were clearly erroneous and that he erred in denying an evidentiary hearing as to 7 of the 9 contentions pressed by petitioner.

The Court below correctly adopted the conclusion of Magistrate Schrieber to the effect that:

> "While it is true that due to a procedural error on petitioner's part, the merits of his claim were not heard by the New York Court of Appeals, petitioner did attempt to reinstate his appeal and was rejected. Therefore, he no longer has state remedies open to him and has met the exhaustion of

remedies requirements of 28 U.S.C. §2254. *Humphrey v. Cady*, 405 U.S. 504, 516 (1972); *Fay v. Noia*, 372 U.S. 391, 435 (1963); *Duke v. Wingo*, 386 F.2d 304, 306 (6th Cir. 1967), *cert denied*, 390 U.S. 1028. Cf. *Donovan v. Delgado*, 339 F. Supp. 446 (D. Puerto Rico, 1971)."

(p. 3 Magistrate's Report of October 4, 1973)

POINT I

THE RECORD DOES NOT FAIRLY SUPPORT THE FINDING THAT PETITIONER WAS COMPETENT TO INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL AND DID VALIDLY WAIVE THAT RIGHT AND THE FEDERAL HEARING WAS NOT A MEANINGFUL ONE.

The District Court in its October 30, 1973 Memorandum recognized that the state doctors had not focused on the issue of petitioner's competence to waive counsel and the record was barren of any meaningful inquiry by the trial judge. More than seven years after the alleged waiver the District Court ordered an evidentiary hearing. It could not be and was not a "meaningful hearing..., at this late date." See *Dusky v. U.S.*, 362 U.S. 402 (1960) and in particular see *Drope v. Missouri*, __ U.S. __, 95 S.Ct. 896 (Decided February 19, 1975).

While the courts are bound to recognize and protect the right to counsel provided by the Sixth and Fourteenth Amendments to the Constitution, this right of course is not absolute in the sense that it may not be waived.

A precise statement of the applicable principles however is contained in *United States ex rel Brown v. Fay*, 242 F.S. 273 (S.D.N.Y. 1965, Weinfeld, J.):

"In consideration of the issues it is desirable to set forth the standard to be applied. In *Carnley v. Cochran*, 396 U.S. 506, 517-518, the Supreme Court held that only where the record demonstrates a petitioner's 'affirmative acquiescence' in the surrender of his right to counsel is the burden upon him to establish that he did not intelligently and understandingly waive his right. While the phrase 'affirmative acquiescence' was not defined, in this Court's view, it encompasses that the accused (1) was advised of his right to counsel, and (2) consented to proceed without representation--objective matters normally ascertainable from the judgment roll.

"The State, at the outset, is aided by the presumption of regularity which attaches to the judgment and which extends to observance by the State of an accused's constitutional rights. But when the petitioner goes forward with substantial evidence with overcomes the presumption of regularity relied upon to establish that the judgment was free of constitutional taint, 'the presumption is out of the case'; thereupon the burden is upon the State to establish 'affirmative acquiescence'--that in fact petitioner was advised of and waived his right to counsel and, if it succeeds, only then is the petitioner called upon to prove by a fair preponderance of the evidence that his waiver was not competently or understandingly made. And, of course, if the State fails to sustain its burden on 'affirmative acquiescence,' that would end the case."

"The responsibility [is] upon the Trial Court to make meaningful inquiry" [*U.S. ex rel Brown v. Fay, supra*] in order to assure affirmative acquiescence.

Judge Weinfeld in *Brown* further stated:

"Our own Court of Appeals similarly has stressed the need for searching inquiry. In *United States v. Plattner* it emphasized the responsibility of 'the presiding judge, by recorded colloquy with the defendant, to explain' the various choices available,

> the advantages of legal representation, and the consequences of a waiver, so that there emerges' *** a record sufficient to establish to our satisfaction that the defendant knows what he is doing and his choice is made with eyes open." 330 F.2d 271, 276 (2d Cir. 1964). While these cases are Federal prosecutions, in view of the Federal character of the right to counsel the State standard can be no less. *Post v. Boles*, 332 F.2d 738, 743-4 (4th Cir. 1964) - dissenting opinion. And indeed the New York Court of Appeals has indicated it is no less and that more is required than a pro forma inquiry. *People v. Marincil*, 2 NY 2d 181."

See also *People v. Witenski*, 15 N.Y.2d 392, 259 N.Y.S.2d 413; *People v. Spohn*, 351 N.Y.S.2d 174 (App. Div. 2d).

In *Spohn*, the Court stated that the trial court is to "advise the defendant of the hazards" of proceeding *pro se*.

The record is barren of any evidence that the state trial court, before accepting the waiver, conducted the kind of "thorough," "meaningful," "comprehensive," "penetrating," "searching" inquiry which it was required to conduct in order to determine if there were in fact "affirmative acquiescence" in the surrender of the right, that is that the surrender of the consitutional right was competently and understandingly made. See *Von Moltke v. Gillies*, 332 U.S. 708, 723-724 (1948). The need for such inquiry was particularly important here considering the Court was on notice that petitioner had a conceded emotional and/or mental disturbance, the precise nature and extent of its disabling consequence being subject to a diversity of opinion among and between competent psychiatrists.

Before the "waiver," the trial judge repeatedly had opined that petitioner was "mentally ill," "very sick," "mentally

sick." See Second Sanity Hearing, pp. 1344, 1365, 1399, 1527-8, 1658, 1923 for explicit comments by the state Court as to the serious extent of petitioner's "mental illness." All this took place well before the January 3, 1967 "waiver."

In light of the Court's failure to conduct the kind of meaningful examination which the Supreme Court has absolutely mandated in matters of this kind, it cannot be said that the State sustained its burden of showing that there was affirmative acquiescence by petitioner in the surrender of his right to counsel or that his surrender was competently and understandingly made. (See e.g. *U.S. ex rel Jefferson v. Fay*, 364 F.2d 15, 17 (2d Cir. 1966) citing *U.S. ex rel Brown v. Fay, supra* with approval.)

The record is undisputed that though there were two Sanity examinations the doctors were not asked to focus on the question or possible question of petitioner's capacity to waive counsel in an intelligent fashion, which would include his understanding of the hazards of conviction. (See Judge Tyler's memorandum of October 30, 1973, p. 3.) Despite the view of the Magistrate and the suggestion of the District Court that the New York test under which petitioner was found competent to stand trial may well have been broad enough to include the issue of whether he was competent to waive counsel, it is clear that it was not. No one ever explored whether the petitioner understood the "worst of the consequences" were he to be found guilty, i.e. the hazards of proceeding *pro se*. Former Code of Criminal Procedure, 658 did not require such a determination. *People ex rel Butler v. McNeil*, 30 Misc. 722, 219 N.Y.S.2d 722.

What was before the state trial judge at the time the petitioner sought to defend himself was testimony at pp. 1543, 1547, 1610 of the Second Sanity Hearing to the effect that a majority of the examining doctors at the Medical Center for Federal Prisoners were of the opinion that petitioner shortly before his trial did not in some "realistic measure know the kind of trouble he could get into were he to be found guilty." The state doctors in conducting their examination into competency to stand trial were not called upon and did not report on that aspect of petitioner's condition. See *Westbrook v. Arizona*, 384 U.S. 150 (1965). There was no on or off the record discussions by the Court with petitioner relating to the allowable range of punishment, the possible effect of prior out of state convictions on sentence or the possible alternative of petitioner securing other counsel (FHT 106-107, 122, 123).

The proof is unrebutted that at the time the petitioner waived counsel on January 3, 1967 he was unaware that his out of state convictions would seriously increase his hazards upon conviction (FHT 66 ff). What is critical to note, in addition to the lack of investigation by the trial judge, is his conduct which served only to deter a rational decision by petitioner. Thus, he repeatedly told petitioner as well as Frank Lopez that whatever the outcome of the trial he "would not throw the book" at petitioner. (See FHT 72 and Trial Minutes, 1699, 1717, 1721, 3296.) This served to allay petitioner's fears and had just the very opposite effect than the one the court was obliged to seek (FHT 29 ff, 68-69, 73). Further, the court constantly reassured

petitioner that he was highly able in the conduct of his defense--thus making it impossible for any lawyer to get through to him. See Trial Minutes 733, 1699-1700, 1717 and FHT 29 ff, 68-69, 73. In other words what we have in the case at bar is a petitioner:

1. Who was mentally disturbed, a circumstance conceded by the trial court. See express statements to this effect at Second Sanity Hearing Minutes 1344, 1365, 1399, 1527, 1528, 1548, 1593, 1658, 1923. He was "mentally sick," "mentally ill," he was "insane" stated the court.

2. Who did not understand the hazards he faced upon conviction.

3. Who instead of being alerted by the judge to the hazards was falsely reassured that he would not be dealt with harshly on sentence were he convicted.

4. And, who was told erroneously, that he was brilliant, as able as any lawyer--all having the effect of making it impossible for either Lopez or Kahn to talk with, assist or counsel him.

Judge Tyler was in error in his Findings when he stated that lawyers Kahn and Lopez were continually present (see pp. 8 and 18 of his opinion of January 13, 1975). First, Mr. Justice Gellinoff himself testified that petitioner conducted his own defense (FHT 154). He so stated this at trial (1700, 3078, 3296, 3799 and 182 of the sentence minutes). In addition, the record shows that on a number of critical sessions neither Mr. Lopez nor Miss Kahn even attended Court sessions (1820, 2202, 2316, 2473, 2605, 2791, 3057, 3166, 3251, 3301).

There is no support for Judge Tyler's finding that Mr. Justice Gellinoff made sufficient inquiry into the issue of petitioner's competency. The record fails to show any "meaningful," "penetrating," "searching," "thorough" investigation. Rather, it shows conduct on the part of the trial judge which could have no effect other than to falsely reassure petitioner and dissuade him from seeking sensible alternatives other than proceeding as he then intended.

A point of contention at the hearing and in the opinion of the court below was whether a trial judge must use the same care in determining whether a defendant is competent to intelligently waive counsel as he does when determining whether a defendant is competent to intelligently waive a trial and plead guilty. The court below thought there was a difference (see opinion of January 13, 1975, pp. 14-15). We submit there is not. The Ninth Circuit has held:

> "We see no rational distinction between the test for determining a competent and intelligent waiver of competent counsel and that for determining a competent, voluntary and intelligent waiver of any other constitutional right. Judicial experience with human frailties has long since taught the necessities of safeguarding the accused in criminal proceedings. See the historical notes to the 1966 amendment to Rule 11, Federal Rules of Criminal Procedure. We cannot visualize a less minimal requirement than the District Court shall not grant a request to waive counsel and proceed *pro se* without addressing the accused personally and determining on the record that the demand to waive counsel and proceed *pro se* is competently and intelligently made with understanding of the nature of the charge *and the penalties involved*."
>
> (Emphasis added)

United States v. Dujanovic, 486 F.2d 182, 186; see also *Bramlett v. Peterson*, 307 F.S. 1311 (M.D. Fla. 1969)

In this Circuit an intelligent waiver of trial must be with an understanding of "the worst of those consequences that can be forseen..." from surrendering the right. *U.S. v. Caruso*, 280 F.S. 371, 373 (S.D.N.Y. 1967).

But assuming arguendo a mentally disturbed defendant even knows the allowable range of punishment, what is the inevitable effect of a trial court acting in the way it did herein? Once the Court said that it would not impose the kind of severe sentence which would keep him from his family, would not throw the book at him (which was said several times) and that he had great legal ability, petitioner was simply unmanageable and placed in a position where he could not be expected in light of his conceded mental instability to make an intelligent decision.

The District Judge ignored this aspect of the case in making his Findings.

The importance of the "waiver" of counsel must be measured not only by the hazards the petitioner faced on possible conviction, but in light of the complexities of the trial and the serious problems which arose during the trial. It is submitted that the total of these added up to a denial of fundamental fairness, violative of the due process clause.

POINT II

PETITIONER WAS DENIED A FAIR TRIAL BY REASON OF EXCESSIVE PREJUDICIAL PUBLICITY WHICH THE TRIAL COURT RULED IT LACKED THE POWER TO CONTROL.

There was no evidentiary hearing. The District Court approved the Magistrate's report which stated that with only twenty articles over the course of a nine week trial the publicity did not reach "saturation" level.

Jury selection began on December 7, 1966. The jury was discharged on February 9, 1967.

Due process was violated not only from the number of articles, but the contents thereof, including trial interviews with the prosecutor and judge, the Court's mistaken belief that it lacked the power to control the flow of prejudicial publicity or to take any steps other than a general admonition to the jury as a whole not to read the papers to insulate petitioner from the possibility of prejudice and the refusal to individually voir dire the jurors when it was reported prejudicial articles were seen in the jury room.

The articles were sent to Judge Tyler in a separate letter to him dated March 16, 1973.

As earlier noted in the statement of facts the Court over petitioner's protest permitted an openly prejudiced juror to sit from January 7, 1967 to February 6 (719-722). The Court encouraged the jurors to talk out their problems with each other (1134-37).

A series of articles published in New York City newspapers almost daily during the course of the taking of testimony continually

referred to the murder of a potential witness and the fact that petitioner was not only a federal prisoner, but a person with a long criminal record and violent propensities. When petitioner indicated to the Court that the jury room was littered every day with these newspapers (3142) the Court denied each demand to poll the jury individually and conduct a voir dire examination to determine whether or not the jurors had read the articles in question and if so, if they had been prejudiced by them. The following are merely illustrative:

The New York Daily News of December 21, 1966, at page 26 (Court's Exhibit 1 for identification, 109) reported petitioner's criminal record (112). On motion for a voir dire of the jury (108-109) the Court denied the motion and erroneously stated (109):

> "All right. The Court rules that the press has a perfect right to report what is going on in court. *The Court rules that the press has a perfect right to print whatever information it obtains from whatever source may be.*"
>
> (Emphasis supplied)

The New York Post of January 4, 1967, published a prejudicial article in which it recited the fact that Cannastraci was a victim "of gangland slaying September the 20th" and petitioner was mentioned as the object of the article (869-970). Petitioner asked the Court to conduct an inquiry of each member of the jury to ascertain if they had read the article, and, if so, to determine possible prejudice against the petitioner. The motion was denied. (870)

The New York Times of Friday, January 6, 1967 (Court's Exhibit 5), published during the presentation of the prosecution's

case, reported that the petitioner was disrespectful to the Court and reported an interview with Mr. Justice Gellinoff (1141-1143). The Times in the same article also reported that "Konigsberg also faces a charge that he beat Mr. Cannistraci with a lead pipe in 1963... The latter was found shot to death on the Long Island Expressway near Lake Success September 21st" (1144-1144a). The same article also quoted the District Attorney's office as stating "Konigsberg ... as one of the biggest loan sharks in the country is on trial on charges of extortion and assault" (1145-1146).

The New York Post on Wednesday, January 25, 1967, published another article with reference to the trial and indicated that the petitioner had a prior criminal history and was under service of a ten year federal court sentence (3143). The petitioner protested (3144):

> "If the jury read this article they definitely were not entitled to know anything about the defendant unless the defendant takes the stand, or through some other way way that is legitimate. ... The Court never requested these reporters to delete that but encouraged the reporters by giving them interviews."

The articles claimed private interviews with both the Court and the District Attorney's office in which information was related which could not be admitted into evidence in the trial below. The declaration that petitioner was a vicious loan-shark and the clear indication he was a murderer could not help but prejudice his cause were any juror to see it. The newspapers quoted both District Attorney and Court to give credence to their accounts.

With respect to continual prejudicial publicity, had petitioner counsel he might have corrected the erroneous view of the trial judge that the press was free to exercise uncontrolled discretion to print whatever they wanted from whatever source (109).

One thing was certain:

> "The Court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence."
>
> (*Sheppard v. Maxwell*, 384 U.S. at 357-8.)

This decision actually preceded petitioner's trial.

Counsel might have alerted the court to something it should already have known: that it had power to control the flow of prejudicial matter. What is crystal clear is that the direction to a jury not to read the papers and a threat to hold anyone in contempt for violating the order is the least effective method to protect a defendant's rights. See *U.S. v. Accardo*, 236 F.2d 269 (8th Cir. 1956). The court was obliged to examine each juror with respect to his exposure outside the presence of the other jurors. See *Coppedge v. U.S.*, 272 F.2d 504, 507-508 (D.C. Cir. 1959). In light of the nature of the publicity the court was obliged to take "strong measures to ensure that the balance is never weighed against the accused." *Doggett v. Yeager*, 472 F.2d 229 (3rd Cir. 1973).

The Court should have known, that methods other than the one it chose could best serve the ends of justice, i.e. sequestration, a prohibition on the District Attorney giving out any material other than what transpired in court or a communication to the press requesting them not to print any matter other than what occurred in court. To simply and erroneously state that the court lacked power to control the flow of prejudicial publicity from whatever source is for the court to abandon its responsibilities. The group admonition was meaningless when matched against the very real risk of prejudice from continued prejudicial publicity. See *Irvine v. Dowd*, 366 U.S. 717 (1961).

Petitioner was denied the protection to which he was entitled. With the existence of prejudicial publicity, the unrebutted claims during trial by petitioner that articles were in the jury room, the view of the Court that it lacked the power to deal with the problem of prejudicial publicity except a group admonition and the fact that both the prosecutor and judge spoke with the press during trial all served to deprive petitioner of a fair trial and deny to him due process.

POINT III

PETITIONER WAS SUBJECTED TO A VIOLATION OF DUE PROCESS WHEN THE PROSECUTOR FAILED TO DISCLOSE A PROMISE WITH THE KEY WITNESS AND THE DISTRICT JUDGE FAILED TO HOLD AN EVIDENTIARY HEARING.

On September 25, 1973 the petitioner moved to amend the petition, claiming that the state prosecutor had suppressed material

and probative evidence relating to a promise or understanding made to or with a key witness, Albert Hayutin who had been a co-defendant. The original petition had already been referred to the Magistrate. The District Judge by order dated October 16, 1973 permitted amendment, but denied the relief on the merits without an evidentiary hearing. The circumstances of this prayer are spelled out in the statement of facts herein. Attached to the September 25, 1973 motion were the sentencing minutes of the witness. (For this Court's convenience a copy of these minutes will be handed up at the time of oral argument.) His lawyer claimed assurances of a suspended sentence before his trial testimony. And, it was just such a sentence he received. When the witness testified to no promise or understanding (568-69, 1969) the prosecutor sat still.

If as Hayutin's lawyer claimed there was an agreement to see that Hayutin received a suspended sentence in return for his testimony, then the prosecutor was obliged to promptly bring this to the attention of the Court and the jury. The law is too clear to require extended discussion that the failure of a prosecutor to disclose to a jury plea bargaining negotiations with a key witness deprives a defendant of constitutional due process. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. U.S.*, 405 U.S. 150 (1972); *U.S. v. Smith*, 480 F.2d 664 (5th Cir. 1973).

The issue was not referred to or reported on by the Magistrate. The District Judge resolved the factual issue on the papers against petitioner without a hearing. This was clearly erroneous.

The matter was clearly one requiring a factual hearing. *DeMarco v. U.S.*, 415 U.S. 449 (1974).

POINT IV

PETITIONER DID NOT MAKE AN INTELLIGENT AND KNOWING WAIVER OF HIS RIGHT TO A JURY OF TWELVE.

The District Court denied relief without an evidentiary hearing.

Nowhere does it more clearly appear the petitioner needed assistance of counsel than at the time when after some 25 hours of jury deliberations a juror became ill and petitioner was called upon to decide whether to permit the replacement of the juror by an alternate. The prosecution asserted in the state appellate court that petitioner "consented" to the replacement of the juror. But whether it be called "consent" to replacement of the juror or another "waiver" by petitioner of his right to be tried by the jury as originally constituted, the burden rested heavily upon the state to demonstrate knowing and intelligent action on the part of petitioner. "waiver" - *Johnson v. Zerbst*, 304 U.S. 458 (1938); "consent" - *Judd v. U.S.*, 190 F.2d 649 [D.C. Cir. 1951].)

It is also clear that the state court was under an obligation to advise the petitioner of the consequences of his action and the possible alternatives. A reading of the relevant pages of the transcript (4201-4206) shows that petitioner was not informed of his rights. That is, he could have agreed to relieve juror numer 3 and proceeded with an 11 man jury. He could on the other hand, have refused to permit the replacement of the juror and had the mistrial he apparently wanted but did not know that

he could have obtained simply by withholding his "consent" (4206-4208).*

In *U.S. v. Virginia Erection Corp.*, 335 F.2d 868, 871 (4th Cir. 1964), even the consent of competent counsel did not save the conviction where a juror had been added to the panel originally deliberating. (See reference at p. 871 to the effect that jury of more than twelve not constitutional.)

The record in the case at bar shows that when petitioner sought advice from the Court he was abruptly cut off (4205).

Whether what occurred herein be viewed as a "waiver" of the twelve man jury as originally constituted at the time deliberations began, or a "consent" to the addition of an added juror, it is a constitutional verity that:

> "the duty of the trial court ... is not to be discharged as a mere matter of rote, but with sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial [i.e. the 12 man jury] or from any of the essential elements thereof, *and with a caution increasing in degree as the offenses dealt with increase in gravity.*"
>
> *Patton v. U.S.*, 281 U.S. 276 (1930)
>
> (Emphasis supplied)

The gravity of a 44 year sentence consecutive to the 10 year federal sentence need not be emphasized. There were no cautions.

The record reflects that the issue of knowing waiver or consent was not resolved in the state court; rather, the record

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* The "consent" form is not in the court file and the prosecutor advised that he had no copy. Petitioner does not have it.

supports the claim that petitioner acted without the requisite understanding of his rights and the possible alternatives of the consequences of his action. And, the Court purposefully avoided advising petitioner of his rights. As in other instances where the issue of waiver or consent was pressed by the prosecution this Court must determine for itself whether the State applied the proper test for the waiver of a fundamental right. *Johnson v. Zerbst, supra; Fay v. Noia,* 372 U.S. 391 (1963).

That Magistrate Schrieber read the minutes is clear. It seems clear though that the District Judge did not. He considered "the (Magistrate's) report and the papers and briefs of the parties." (Though it is outside the record, it is nonetheless a fact that the minutes were not sent to the District Judge by the Magistrate until after the Judge's Memorandum of October 30, 1973.)

POINT V

OTHER RULINGS DURING TRIAL UNDER THE FACTS OF THIS CASE DEPRIVED PETITIONER OF FUNDAMENTAL FAIRNESS.

(A) Permitting a Prejudiced Juror to Continue

It has been said that "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136 (1955). And also: "...at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas,* 381 U.S. 532 (1965). An accused is entitled to nothing less than a jury that is neutral. *Fay v. New York,* 332 U.S. 261 (1946).

With these principles in mind how suspect becomes the state court practice in the matter at bar of permitting an openly prejudiced juror to sit on the jury all through this long trial. See pages 719-724. Early in the trial juror number 10 openly voiced without any reticence that he was absolutely prejudiced and could not sit. This followed the action of petitioner in discharging his counsel. Rather than discharge the juror the Court over objection and without any voir dire at the bench, permitted this prejudiced juror to sit throughout the trial and mingle with fellow jurors. What can possibly justify this? Had petitioner counsel, the possibility exists that the trial judge could have been persuaded to remove the juror and avoid even the risk or possibility of contamination.

In opposition to the claim that the procedure adopted by the State posed a likelihood of prejudice, the State may argue that the jurors were each day advised that they were not to discuss the case among themselves. However, the Supreme Court has made it clear that cautionary instructions to a jury are not always adequate to insulate a defendant against prejudice. (*Bruton v. U.S.*, 391 U.S. 123 [1968].) And, it is critical to note the Court invited the jurors early in the trial to talk to each other about their problems with the case, this while a prejudiced juror remained on the jury (1134-1137).

In the case at bar, with several alternates in readiness the alternative was clear: excuse the juror and replace him. To have done otherwise was to expose petitioner to the likelihood of prejudice inconsistent with the mandates of due process.

(B) The Trial Court's Prejudice

Little could be expected from the Trial Court in the way of protecting petitioner against prejudice. The Court at that time was selected by the prosecutor. The Court had earlier been convinced that the petitioner was a "faker," a "malinger" despite the weight of testimony the other way, and consequently did nothing to assure that petitioner's rights were adequately safeguarded or that he was advised of his rights and the consequences of his acts.

The trial transcript bristles with exchanges between the Court and this mentally infirm petitioner. The Court added to the circus atmosphere when it advised the jury that the defense of petitioner's cause would be handled by petitioner with the assistance of "Judge Roy Bean." If there were any doubt about the partiality of the Trial Judge it was clear for all to see and hear when the jurors after being deadlocked for over twenty hours asked for additional instructions on the conspiracy count (4192). Rather than reread the instructions the Court made it clear by a cleverly worded added charge that proof in the case was sufficient for conviction. The Court gave a "hypothetical" set of facts which dovetailed the testimony of the prosecution's key witness, Albert Hayutin, complete with the necessary obscenities. (The Court said: "Supposing I go a step further and I get ahold of you and we agree, 'Look, we'll get that money. We have to kick the shit out of him, but we are going to get it'" [4194]).

Compare the added instruction appearing at 4194 with the testimony at 194 and the added charge appearing at 4195-6 with the testimony at 200-201.

It was no surprise that this earlier hopelessly deadlocked jury responded soon thereafter with a guilty verdict.

POINT VI

THE WRONGFUL FRUSTRATION OF PETITIONER'S DIRECT RIGHT OF APPEAL WAS VIOLATIVE OF DUE PROCESS AND EQUAL PROTECTION.

The District Court held no evidentiary hearing on this point but "adopted" the report of the Magistrate.

That petitioner's cause on appeal was worthy of consideration by the Court of Appeals was evidenced by the certificate (annexed to the Petition) issued by Chief Judge Fuld on July 6, 1970. This attested to the fact that his case presented issues warranting review by the highest Court of the State.

Petitioner claimed below that:

> (a) he was indigent and unable to meet the costs of preparing the required appendix on appeal and that the dismissal of his appeal when he was unable to comply with the order of the Court of Appeals resulted in a violation of his right of equal protection;
>
> (b) acceptance by the Court of Appeals of the position urged by the People, that he had sufficient funds, without an evidentiary hearing and over his repeated claims of indigency deprived him of a meaningful opportunity

to be heard on a nerve center issue, in violation of his right of due process.

The affidavits submitted to the Court of Appeals made clear this position of the People, which apparently was accepted by the Court: (a) Since petitioner had in earlier litigations spent monies he should be required to undertake the expense of filing an appendix (estimated as costing $16,000) in the case at bar; and (b) Since his wife had funds he should obtain what was necessary from her to process the appeal (whether this was her separate property from another marriage or monies given her many years ago was not considered by the People as they pressed for dismissal of the appeal).*

During this critical period when the matter was before the Court of Appeals, petitioner was in the midst of a serious dispute with his counsel (who himself had moved to withdraw) and was in the Federal Medical Facility certified as one in need of mental care and treatment. Consequently, the motion papers for relief in the Court of Appeals were prepared *pro se*.

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* A study of petitioner's many motion papers in the New York Court of Appeals to dispense with an appendix and for extensions of time supported by the affidavit of his then attorney Frank Lopez, reflect that petitioner may well have misunderstood the appendix requirement, that is, he was counseled that he needed multiple copies of the 7,000 page transcript. Thus, he annexed to his papers an extimate from a printer of $16,000. It may have been that the court having the trial record on file would have accepted an abbreviated appendix. Petitioner's papers show no awareness of this.

The law is too settled to warrant extended discussion that under due process and equal protection destitute defendants must be afforded as adequate appellate review as defendants with sufficient funds. See e.g. *Griffin v. Illinois,* 351 U.S. 12 (1955); *Lane v. Brown,* 372 U.S. 477 (1963). To be sure, the Court has mandated that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws" (*Smith v. Bennett,* 365 U.S. 708, 709 [1960]).

With respect to petitioner's intermediate direct appeal the Appellate Division had in fact afforded him the right to appeal as a poor person. Consequently, the appeal in that Court was heard on the original trial and sanity record of some 7,000 pages. This apparently in no way hindered the state in disposing of the intermediate appeal. It does not appear, therefore, that any state interest would have been unduly hampered were this followed in the Court of Appeals. In the Court of Appeals petitioner, however, was met with the requirement that he reproduce multiple copies of an appendix and that the appeal would not be heard as it was below solely on the basis of the original record. When petitioner was unable to pay for the needed appendix his appeal was dismissed. He was, as a result, denied access to the Court of Appeals.

What cannot be disputed at this stage of our legal development is that were petitioner indigent when the Court of Appeals insisted on an appendix such action would be violative of petitioner's constitutional rights. *Douglas v. California,* 372 U.S. 353 (1963); *U.S. ex rel Taylor v. Reincke,* 225 F.S. 985

(D.C. Conn. 1964). See also *U.S. ex rel Reis v. Leppic*, 256 F.S. 881 (D.C. Fla. 1966); *U.S. ex rel Edwards v. Follette*, 281 F.S. 632 (S.D.N.Y. 1968) affirmed 399 F.2d 298 (2d Cir. 1969).

The issue warranting study in the District Court was whether the Court of Appeals by resolving the issue of indigency simply on conflicting affidavits afforded petitioner the kind of full and fair hearing through a procedure adequate to resolve the contested facts. *Townsend v. Sain*, 372 U.S. 293 (1963). Where the petitioner's testimony is rejected by the state court after a procedurally adequate and substantively acceptable hearing, the federal court is of course bound to deny the petition for relief. See *United States ex rel LaVallee v. Delle Rose*, 468 F.2d 1288, 1290 (2d Cir. 1972) reversed on other grounds, 410 U.S. 690 (1973).

Can it seriously be disputed that resolution of strongly contested factual issues (on a nerve center matter) on the basis of conflicting affidavits is patently inadequate for the ascertainment of truth? In civil cases on motions for summary judgment Courts will not so act where the issue is only one of dollars and cents. How egregious then is the approach taken herein by the Court of Appeals where 44 years of a man's life was involved and his last right of appeal was in the balance.

Petitioner made a prima facie showing by affidavit of his indigency. He stood ready to submit to any evidentiary hearing as to his financial status.

The U.S. Court of Appeals for this Circuit has recognized that matters of this type should properly be resolved at a factual

hearing. *U.S. ex rel Pandazzo v. Follette*, 444 F.2d 625 (1971).

The District Court was obliged to recognize the serious inadequacy for ascertainment of truth employed by the State and thus to take evidence anew. *Townsend v. Sain*, 372 U.S. 293 at 316 (1963).

CONCLUSION

THE FINAL ORDER DENYING THE WRIT SHOULD BE REVERSED AND THE WRIT SUSTAINED.

Respectfully submitted,

Dated: May 7, 1975

JAY GOLDBERG
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